

STATE OF MICHIGAN
COURT OF APPEALS

JAMES VELTING and KV INVESTMENTS
LLC,

UNPUBLISHED
May 5, 2005

Plaintiffs-Appellants,

v

No. 250946
Kent Circuit Court
LC No. 99-00893-CZ

CASCADE CHARTER TOWNSHIP,

Defendant-Appellee.

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

In this zoning case, plaintiffs appeal as of right from the trial court's finding of no cause of action on their taking claim and other constitutional claims. We vacate in part and remand for de novo review of plaintiffs' substantive due process claims based on the full trial record.

Plaintiffs are speculators who purchased a parcel of property in Cascade Township with an eye toward mining out its construction-grade sand. The township's zoning ordinance did not expressly permit mining in any region, but required individuals to apply for a special planned unit development (PUD) that would rezone the prospective site of the mine if it met certain qualifications. The only access road for plaintiffs' property was characterized by hills and sharp curves. At one end it approached an intersection at a sharp angle, and at the other end it snaked under a narrow railroad viaduct. Nevertheless, plaintiffs enlisted the assistance of the local road commission and anticipated an eventual reconstruction of the road, in conjunction with the extraction of sand, that would leave a straighter and more level road after plaintiffs had finished mining. Plaintiffs presented their proposal, as part of their PUD application, to the township planning commission for a recommendation, and then to the township board. The planning commission recommended denying the PUD application, and the township board denied it.

Plaintiffs initiated this suit to appeal the decision and challenge it on constitutional grounds. After the initial complaint was filed, plaintiffs decided not to pursue their claims for injunctive relief and reversal of the township board's denial of the PUD, because interim reconstruction of the anticipated access road made mining the sand unprofitable. Therefore, plaintiffs pursued only money damages. The federal claims in plaintiffs' complaint were temporarily removed to federal district court, but were dismissed, by stipulation and without prejudice, as unripe. The cause was remanded to state circuit court, which held a trial.

Following the trial, the court issued its opinion, which addressed the gravamen of plaintiffs' substantive due process claim as if it were a court hearing an administrative appeal. The court found no cause of action and plaintiffs' appeal here followed.

Plaintiffs argue that the trial court improperly applied a deferential standard to the township board's decision to deny the PUD, because plaintiffs were no longer appealing the board's denial but rather were seeking compensation for the board's regulatory taking and violation of their constitutional rights. We agree. Whether a court applies the correct legal standard is an issue we review de novo. *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650, 661-662; 645 NW2d 50 (2002). Ordinarily, we review de novo a constitutional challenge to a zoning ordinance, but afford considerable deference to a trial court's factual findings. *English v Augusta Twp*, 204 Mich App 33, 37; 514 NW2d 172 (1994).

As in *Arthur Land Co*, *supra* at 660, 663, this case was a constitutional challenge to the township board's legislative action of failing to rezone a parcel of property. Such actions must receive de novo review when challenged in court. *Id.* at 662. In this case, plaintiffs asserted that the mining of their sand would not create "very serious consequences" under the test in *Silva v Ada Twp*, 416 Mich 153, 157-158; 330 NW2d 663 (1982), so the township's refusal to rezone the property and allow the mining operation to go forward was unreasonable. Under *Silva*, such an unreasonable zoning restriction violates the property owner's substantive due process rights. *Id.* The trial court granted the township board substantial deference when it reviewed whether plaintiffs proved that no "very serious consequences" would result from the mine. Because plaintiffs' strongest substantive due process claims hinged on this question, the trial court erred when it reviewed the claims as an appellate court rather than a court of first instance. *Arthur Land Co*, *supra*.¹ While we could ordinarily approach this issue on appeal, it is impossible to tell how much the trial court's deference to the township board taints its factual findings, and we do

¹ We note that even if the trial court found that the township violated plaintiffs' substantive due process rights under the Michigan Constitution, the trial court could not award plaintiffs any money on this basis alone. *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000). Defendant is a municipal corporation, MCL 42.1, so it generally qualifies as a municipality. See *Central Advertising Co v Dep't of Transportation*, 162 Mich App 701; 413 NW2d 479 (1987). According to *Jones*, *supra* at 333, 337, a plaintiff may not seek money damages from a municipality for its violation of the Michigan Constitution, because money damages are ordinarily reserved for plaintiffs who lack an alternative remedy, and a municipality's violation of the Constitution of the United States carries with it the ability to recover damages from the municipality under 42 USC 1983. Applying *Jones*, plaintiffs could have brought (and, in fact, did bring) a claim under 42 USC 1983 in federal court, so they ordinarily may not seek money damages for any substantive violation of Michigan's Due Process Clause. Plaintiffs' claim for money damages, as presented, appears unpersuasive at this stage. However, in light of the appeal's focus on the trial court's application of an incorrect standard, it would be presumptuous for us to assume how plaintiffs would try to support their claim for damages if the trial court found a violation of their substantive due process rights under the Michigan Constitution. Therefore, we leave it to the trial court on remand to allow the parties to develop, if necessary, further factual or legal reasons for and against money damages.

not want to usurp the trial court's role as factfinder.² Therefore, we remand for a de novo review of the "very serious consequences" issue. We do not find any other error in the trial court's analysis of plaintiffs' remaining claims because the trial court approached those claims as a court of first instance. We note, however, that the state of plaintiffs' 42 USC 1983 claim is unclear because the trial court's written order and its bench opinion following the summary disposition hearing do not necessarily agree. Therefore, clarification of the status of this claim is also in order.

Vacated in part and remanded for application of the correct standard of review and for further clarification.

/s/ Jane E. Markey

/s/ Peter D. O'Connell

² The majority concurs with Judge Murray's opinion that if this was not a request to rezone this parcel of property, then the standard of review set forth in *Carlton Sportsman's Club v Exeter Twp*, 217 Mich App 195; 550 NW2d 867 (1996), applies and the trial court should be affirmed. However, the lower court record makes it clear that both parties below agreed that this was in fact a request to rezone this parcel of property. Therefore, the standard of review set forth in *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650; 645 NW2d 50 (2002), is applicable. We note without comment that at oral argument counsel for defendant described a request for a special planned unit development (PUD) as a "hybrid situation."